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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN RAMOS,

Defendant and Appellant.

B215135

(Los Angeles County
Super. Ct. No. GA072253)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Suzette Clover, Judge. Affirmed.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jose Juan Ramos (appellant) of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),¹ and found true allegations that he personally used a firearm in the commission of the offense (§ 12022.5, subd. (a)) and committed the offense for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by a gang member (§ 186.22, subd. (b)(1)(B)). The trial court sentenced appellant to 12 years in state prison, calculated as follows: the midterm of three years for the assault, plus four years for the firearm enhancement and five years for the gang enhancement.

On appeal, appellant contends that a field identification process used by the arresting officers was unduly suggestive and irreparably tainted the eyewitnesses' subsequent in-court identifications. Appellant also requests that we independently review the transcript of the *Pitchess*² hearing to determine whether it was properly conducted. We affirm.

FACTUAL BACKGROUND

On December 23, 2007, at approximately 5:30 p.m., in the City of Glendale, Jose Padilla (Padilla) and Rene Espinoza (Espinoza) were sitting inside a Goodwill truck eating lunch and listening to sports radio. They were both employees of Goodwill and were waiting for their evening shift to start. Padilla was in the driver seat and Espinoza, who was sitting in the passenger seat, had his door open. A man approached Espinoza and stuck a gun against his ribs. The assailant, who stood approximately four to eight and a half inches³ away from Espinoza, asked in an angry tone of voice: "Who the fuck are you? What the fuck are you doing in my neighborhood? This is West Side

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535 (*Pitchess*).

³ Espinoza testified that the assailant stood four to five inches away from him. Padilla testified that the assailant stood approximately eight and a half inches away from Espinoza.

Gangsters. You are in the wrong hood, and you know who I am.” Appellant’s tone of voice was filled with rage and anger. Padilla looked directly at the assailant’s face and also observed that the assailant was wearing a white tank top and had tattoos near his clavicles and shoulders. The assailant threatened to kill both Padilla and Espinoza because they were “in the wrong neighborhood.” Padilla told the assailant that they were simply employees of Goodwill and urged the assailant to look at his badge and the Goodwill logos on the pickup truck. Around the same, the store manager began walking toward the pickup truck. As the manager walked past the truck, appellant placed the gun to his side and walked away. Padilla estimated that the encounter with the assailant lasted approximately three minutes.

Appellant then approached one of Padilla’s coworkers who was sitting on the Goodwill facility’s steps. Appellant reached into the coworker’s pocket and the coworker slapped appellant’s hand away. Appellant continued walking and Padilla saw him enter a black Chevrolet Impala that was parked a short distance from the Goodwill truck.⁴ Appellant started the car and the back lights turned on. As the assailant drove off, Padilla noticed that the light illuminating the rear license plate on the Impala was not functioning. According to Padilla, when the assailant first approached them, “there was still sunlight out, but it was about to be dark.” By the time the assailant drove off, it was near dark.

Padilla dialed 9-1-1 and a tape of that call was played to the jury. In the call, Padilla informed the emergency operator that a member of the West Side Gangsters had threatened them with a gun and described the assailant as a “male Hispanic age 35, 30-35, 5’6” [to] 5’9,” 150 pounds with numerous tattoos and a white, um, under, under garment.” He also informed the emergency operator that he saw the assailant drive off in a “black Impala.” When asked by the operator whether Padilla knew the vehicle’s

⁴ Padilla testified that he recognized the vehicle as a Chevrolet Impala because of the rear circular lights, a feature that he believed was unique to the Impala.

license plate, Padilla responded, “when he turned on his car[,] there is usually a lamp by the license plate but it wasn’t functioning.” The emergency operator relayed this information to the Glendale Police Department (GPD).⁵

GPD Officer Guillermo Jimenez recalled that a known West Side Locos gang member drove a black Impala and lived in Glendale. He provided ground units with this person’s address and two GPD officers, Alicia Braxhoofden and Matt Sakarian, went there. When the officers arrived, which was approximately 20 minutes after Padilla’s call to 9-1-1, they saw a black Impala parked across the street from the address. The officers approached the vehicle and saw appellant sitting inside the vehicle.⁶ Appellant ignored several commands by the officers to put his hands where the officers could see them. When Officer Braxhoofden opened the car door, appellant’s eyes were closed. He slowly opened his eyes and eventually made his hands visible. Officer Braxhoofden could smell alcohol on appellant’s breath. Appellant told the officers that he had been asleep and parked at that particular spot for several hours. Officer Braxhoofden touched the Impala’s hood and noted that it was “extremely warm.” The officers detained appellant and searched his person and car. They did not find a firearm. Officer Braxhoofden turned on the vehicle’s engine and observed that the light illuminating the rear license plate light was not functioning. At the time of his arrest, appellant was five feet five inches tall and weighed 170 pounds.

Appellant was wearing a dark-colored T-shirt or polo shirt with a white tank top underneath when he was initially detained. Officer Braxhoofden notified the supervising

⁵ In a police interview conducted shortly after the incident, Espinoza described the assailant as a male Hispanic with a shaved head and goatee measuring five feet six inches and weighing 160 pounds.

⁶ At trial, appellant stipulated that he was the registered owner of the black Impala that the officers found him sitting inside.

officer, Eric Saavedra, that they had detained appellant.⁷ Officer Saavedra picked up Padilla and Espinoza, who had remained at the Goodwill facility after they had been interviewed,⁸ and drove both of them in his patrol vehicle to where appellant had been detained. Before they arrived, Officer Braxhoofden removed appellant's outer shirt in accordance with Officer Saavedra's instructions. Officer Saavedra stopped the patrol vehicle approximately 15-20 feet away from where appellant was standing. Both Padilla and Espinoza identified appellant as the assailant during the field identification. The field identification process took approximately one to two minutes. According to Officer Saavedra, the area where appellant was standing during the identification was "pretty well lit."⁹ Appellant's Impala was not visible to Padilla or Espinoza during the field identification.

At trial, both Padilla and Espinoza identified appellant as the assailant without reservation or equivocation. The prosecution showed Padilla a photograph of appellant's upper body and Padilla testified that the tattoos on appellant's body were consistent with the tattoos he saw on the assailant. The prosecution also showed Padilla photographs of appellant's black Impala. Padilla testified that the vehicle in those photographs looked "almost identical" to the vehicle he saw the assailant drive off in.

⁷ When Officer Braxhoofden initially encountered appellant, she was of the opinion that he did not match the description of the assailant provided by dispatch. She subsequently reversed her opinion and concluded that appellant did match the description provided by dispatch.

⁸ After his interview with Padilla, Officer Saavedra wrote in his report that Padilla was 50 feet from Espinoza when appellant approached Espinoza. Padilla, however, testified that he was sitting next to Espinoza when appellant approached Espinoza, and Espinoza confirmed this fact at trial.

⁹ Padilla and Espinoza also testified that the area where appellant was standing was "well-lit" by street lights. Officer Braxhoofden, however, testified that the area where the field identification took place "was not very well lit."

GPD Detective Sean Riley testified as the prosecution's gang expert. Detective Riley, whose assignment at the time was to monitor and investigate the West Side Locos gang, testified that appellant had admitted membership in that gang sometime before the incident. Detective Riley testified that the gang's primary activities included murder, assault with a deadly weapon, and carjacking. Furthermore, appellant's act of intimidating and threatening Padilla and Espinoza benefitted the West Side Locos gang because it bolstered the gang's reputation for violence.

Appellant testified that on December 23, 2007, he had spent most of the morning and afternoon drinking beer and relaxing with two of his friends, Oscar Jasso (Jasso) and Rafael Castillo (Castillo). Sometime in the late afternoon, one of his friends proposed going to a bar to continue drinking. Appellant declined the invitation because he had to work the next day. Appellant drove home, parked his car across from his home, fell asleep, and woke up only after police officers banged on his car window. Appellant could not remember the approximate time when he parted ways with Jasso and Castillo.

Jasso and Castillo both testified that they had spent the morning and afternoon of December 23, 2007, with appellant. Both witnesses, however, could not remember the approximate time when appellant declined their invitation to go to a bar and instead went home.

Evelia Lara, appellant's aunt, testified that on December 23, 2007, appellant left for work at approximately 9:00 or 10:00 in the morning. In the evening, she saw him sitting in his car for 10 to 15 minutes before the police arrived. Lara had no knowledge of the activities appellant engaged in from 10:00 a.m. until 6:30 p.m. on that day.

DISCUSSION

I. Field Identification Procedure

Appellant contends the field identification process was unduly suggestive for the following reasons: (1) the officers forced him to wear only his white undergarment tank top; (2) the officers did not separate the two witnesses during the identification; and (3) the showup occurred in a highly suggestive context with appellant handcuffed and

surrounded by officers. According to appellant, because the field identification process was flawed, the witnesses' subsequent identifications of appellant at trial was irreparably tainted and should have been excluded.

“In deciding whether an extrajudicial identification is so unreliable as to violate a defendant's right to due process, the court must ascertain (1) “whether the identification procedure was unduly suggestive and unnecessary,” and, if so, (2) whether the identification was nevertheless reliable under the totality of the circumstances. [Citation].” (*People v. Carpenter* (1997) 15 Cal.4th 312, 366-367 (*Carpenter*).) The circumstances relevant to the latter inquiry include “such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.” (*People v. Johnson* (1992) 3 Cal.4th 1183, 1216 (*Johnson*), superseded by statute in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107.) Even if an identification process is unduly suggestive and unnecessary, if a witness's identification is nevertheless reliable based on the factors cited above, then the identification is constitutionally sound. (*Johnson, supra*, at p. 1216.)

The applicable standard of review is de novo. (*People v. Kennedy* (2005) 36 Cal.4th 595, 609 (*Kennedy*).)

As a threshold matter, we note that appellant did not object to the identification testimony provided by either Padilla or Espinoza at trial. Thus, appellant has forfeited this issue and is precluded from raising it on appeal. (*People v. Torres* (1971) 19 Cal.App.3d 724, 732 [“Failure to raise the identification issue in the trial court by objection or motion to strike, precludes appellant from asserting the issue on appeal”].)

Forfeiture aside, we conclude that appellant's argument fails because the witnesses' identifications of appellant as the assailant “[were] nevertheless reliable under the totality of circumstances” based on the factors cited above. (*Carpenter, supra*, 15 Cal.4th at pp. 366-367.)

First, both Padilla and Espinoza had ample opportunity to view appellant at the time of the offense. Padilla testified that the encounter with appellant lasted approximately three minutes and he had the opportunity to view appellant's face during the encounter.¹⁰ Espinoza testified that he was able to view defendant from a mere distance of four to five inches. (See *Kennedy, supra*, 36 Cal.4th at p. 611 [evidence that witness saw assailant from five to 10 feet militated in favor of reliability].)

Second, both witnesses' degree of attention to appellant's appearance was sufficiently detailed. Padilla described appellant to the 9-1-1 emergency operator as male, of Hispanic origin, 30 to 35 years old, five feet six inches to five feet nine inches in height, approximately 150 pounds, bearing various tattoos, and wearing a white undergarment shirt. Espinoza described appellant to Officer Saavedra as male, of Hispanic origin, five feet six inches in height, 160 pounds, and having a shaved head and goatee. Also, Padilla observed appellant driving off in a black Impala with a nonfunctioning light above the rear license plate.

Third, the witnesses' descriptions of appellant and his vehicle were markedly accurate. Appellant is male and of Hispanic origin. On the night he was arrested, appellant measured five feet five inches tall, was 170 pounds, was wearing a white undergarment tank top, and had a shaved head and goatee. Moreover, he was found sitting inside a black Impala whose rear license plate light was not functioning, just as Padilla had described. Appellant's contention that "hundreds of Latino men in that area on that day" could have matched the detailed descriptions provided by Padilla and Espinoza is rank speculation.

¹⁰ In his opening brief, appellant maintains "[e]ven on his own version of events, Padilla 'looked ahead' during the incident rather than looking directly at the gunman because the gunman ordered him not to look at his face." Not so. During direct examination, the prosecution asked: "When you looked in the direction of the defendant, did you look at the defendant's face?" Padilla testified: "Yes, ma'am." Padilla went on to testify that later on in the encounter, appellant demanded "Don't look at me in the face" and that is when Padilla turned his gaze away.

Fourth, neither Padilla nor Espinoza equivocated during their identifications of appellant as the assailant in the field showup or at trial. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 990 [whether victim equivocates during identification is one factor in determining reliability].) While appellant correctly points out that Espinoza voiced some doubt about his identification of appellant during the preliminary hearing, that doubt was overshadowed by Espinoza's certainty that appellant was the assailant at trial.

Fifth, just 20 to 30 minutes had elapsed between the offense and the field identification. (*Kennedy, supra*, 36 Cal.4th at p. 611 [evidence "that the length of time between the crime and the identification was *only* three weeks" militated in favor of reliability (*italics added*)].)

In sum, we reject appellant's challenge to Padilla's and Espinoza's field identifications because the challenge was not raised below and in any event, the identifications were nevertheless reliable under the totality of circumstances.¹¹

II. *Pitchess* Hearing

Before the start of trial, the trial court conducted an in camera *Pitchess* review of personnel records belonging to Officers Saavedra and Jimenez.

When requested to do so by appellant, an appellate court can and should independently review the transcript of the trial court's in camera *Pitchess* review to determine whether the trial court disclosed all relevant complaints. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.)

We have reviewed the record of the *Pitchess* hearing in this case and find it adequate to permit meaningful appellate review. There is a full transcript of the in camera review, including a description of the documents provided by the custodian of

¹¹ Because we reject appellant's challenge to the reliability of the witnesses' field identifications on the merits, we need not address his additional argument that trial counsel's failure to object to the identification testimony was tantamount to ineffective assistance of counsel.

records. We have independently reviewed that transcript and see no error in the *Pitchess* court's rulings concerning disclosure.

DISPOSITION

The judgment is affirmed.

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_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

CHAVEZ